



1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK: TRIAL TERM PART 27

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3 DR. MAC TRUONG,

4 Plaintiff,

Part No.

5 -against-

17084

6 CHARLES SCHWAB

7 Member: SIPC, N.Y. STOCK EXCHANGE,

8  
9 Defendant.

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10  
11 CHARLES SCHWAB & CO., INC.,

12 Defendant and Third-Party  
13 Interpleading Plaintiff,

14 -against-

15 TRAN DINH TRUONG, VISHIPCO LINES, AND  
16 DAI NAM HANG HAI CONGTU VISHIPCO,  
LINE OF VIETNAM,

17 Third-Party Interpleaded Defendant.

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18  
19 Index No. 604650-97  
20 60 Centre Street  
New York, New York  
April 29, 2002

21 B E F O R E :

22 THE HON. IRA GAMMERMAN, JSC  
23  
24  
25

A P P E A R A N C E S:

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## Proceedings

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1 THE COURT: This case is 17084.

2 I had indicated when we were last together,  
3 and if I could find the note I'll tell you when that  
4 was -- the 17th -- that I would give Dr. Truong until  
5 today to arrange for the return of the shares and the  
6 money that was, in my view, improperly removed in  
7 violation of my order, and if he didn't do that I was  
8 going to a judge that he was in contempt and would  
9 arrange for his incarceration until he complied with  
10 the order.

11 I understand he has not done that. Is that  
12 correct?

13 MR. HERSHKOWITZ: Judge, I have several  
14 applications.

15 THE COURT: Say whatever you want, of course.

16 MR. HERSHKOWITZ: Thank you very much. With  
17 the Court's indulgence, the applications range from the  
18 technical to the substantive.

19 The overall picture is that before your Honor  
20 should take this kind of action, I think the fair thing  
21 to do is to hear from Dr. Truong.

22 THE COURT: He has a lawyer. I don't hear  
23 from litigants when they have lawyers.

24 MR. HERSHKOWITZ: You're finding scienter  
25 here, and I think that refers to --

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1 (Whereupon Proceedings paused.)

2 THE COURT: Go ahead.

3 MR. HERSHKOWITZ: Very well -- arguing then on  
4 behalf of Dr. Truong, I still think the Court should  
5 conduct a hearing to hear from him.

6 THE COURT: I don't think it's necessary. Go  
7 ahead.

8 MR. HERSHKOWITZ: The Court had found  
9 contempt, with all due respect, it seems to be a bit  
10 precipitously.

11 It accepted Schwab's conclusions as to what  
12 the relevant facts were and what the import of those  
13 facts were.

14 For example, there was a transfer instituted  
15 by Dr. Truong's son who -- out of his account -- Schwab  
16 says that's Dr. Truong's transfer of funds. It was  
17 not. The Court accepts that conclusion. These are  
18 questions of fact.

19 THE COURT: All I have said is that could not  
20 have been accomplished without his participation.

21 MR. HERSHKOWITZ: The degree of his  
22 participation did not establish a material breach of  
23 the order to which he is bound.

24 THE COURT: Nonsense.

25 MR. HERSHKOWITZ: If he attests to the age of

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1 his son, who is now of majority, so that his son can  
2 take his own money, how is that affecting the transfer  
3 of funds?

4 THE COURT: Anything else you want to say?

5 MR. HERSHKOWITZ: Yes.

6 Dr. Truong argues, as a trustee of his son's  
7 accounts, he was obligated, as a matter of law, to  
8 simply attest that his son had become of age and that  
9 that is all he did.

10 THE COURT: He knew very well that by doing  
11 that, that would permit the withdrawal of the funds or  
12 the shares or the units, whatever they are called.

13 MR. HERSHKOWITZ: What do you want to say?

14 (Whereupon the defendant conferred with his  
15 attorney.)

16 (Proceedings returned to open court and on the  
17 record as follows:)

18 MR. HERSHKOWITZ: Judge, with all due  
19 respect --

20 THE COURT: No, absolutely not.

21 MR. HERSHKOWITZ: For the record, Judge.

22 THE COURT: Go ahead.

23 MR. HERSHKOWITZ: We argue that it is  
24 undisputed that in June , 1999 a consent order by which  
25 Dr. Truong agreed to let Schwab continue to not

1 distribute assets in his accounts was executed  
2 including Hugh's custodial account.

3 We further argue that on July 12th, 2002,  
4 Dr. Truong filed for bankruptcy and became a Debtor in  
5 Possession, that is DIP, and therefore Trustee of his  
6 own estate, which is to say that he had the right,  
7 notwithstanding the restriction order, pursuant to  
8 Bankruptcy Code Section 542(b), 543(b), etcetera, to  
9 request Schwab to turn over all assets in which the  
10 debtor had an interest, something which Dr. Truong did  
11 about August of 2,000.

12 Hence there were several written requests by  
13 the Debtor in Possession Mac Truong, the plaintiff,  
14 directing Schwab to transfer assets out from Schwab to  
15 the Debtor in Possession to be held in another bank,  
16 such as E\*Trade.

17 Further, Schwab opposed and cross moved in the  
18 Bankruptcy Court to not only have the right --

19 THE COURT: Excuse me for a moment.

20 (Whereupon Proceedings paused.)

21 THE COURT: Go ahead. I'm sorry.

22 MR. HERSHKOWITZ: Schwab opposed and cross  
23 moved the Bankruptcy Court to not only have the right  
24 to continue to hold on to the assets, but also to  
25 punish the Debtor in Possession for having made several

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1 requests to transfer assets out from Schwab to E\*Trade.

2 Further, of course, the Debtor in Possession  
3 opposed Schwab's said cross motion to sanction him.

4 Further, about December , 2,000, plaintiff's  
5 motion to direct Schwab to turn over assets to him was  
6 withdrawn by Mr. Yablonsky, who is Dr. Truong  
7 bankruptcy attorney, and Schwab's cross motion to  
8 sanction the Debtor in Possession for having repeatedly  
9 requested Schwab to transfer out the assets, that  
10 motion was dismissed.

11 Parenthetically, obviously the Bankruptcy  
12 Court could not sanction a trustee who had only  
13 exercised his power under the Law to request Schwab to  
14 do what the Law directed it to do.

15 At best, Schwab had the right or rather a  
16 valid excuse to deny Dr. Truong's request as Debtor in  
17 Possession, alleging that the Debtor in Possession had  
18 consented to have it restrict his accounts before.

19 In December of 2,000, Schwab was granted, on  
20 the Debtor in Possession's consent, the right to  
21 continue said stipulated order not to distribute the  
22 assets in which the Debtor in Possession had an  
23 interest.

24 Further, about May of 2001, Hugh, turned 18,  
25 and opened an account with Schwab without having



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1 anything to do with the Debtor in Possession, Mac  
2 Truong.

3 Schwab opened it without the Debtor in  
4 Possession's request or authorization.

5 However, Hugh, thereafter requested and  
6 authorized in writing that Schwab transfer his assets  
7 in his custodial account to his new account as an  
8 adult.

9 For this transfer to be lawful, there must be  
10 the consent of Hugh, of Schwab, and of the Debtor in  
11 Possession.

12 However, the consent of all three necessary  
13 parties was given by all of them, and manifested by the  
14 Letter of Authorization. That's the transferred  
15 instrument that your Honor has reviewed in LOA to  
16 transfer assets between Schwab accounts duly signed by  
17 Hugh as the beneficiary of the custodial account, and  
18 by Mac Truong as the custodian of the account.

19 Further, said LOA, Letter of Authorization,  
20 was then used by Schwab, and Schwab transferred Hugh's'  
21 assets in his prior custodial account to Hugh's new  
22 adult account.

23 This was the extent of what the Debtor in  
24 Possession did, authorizing Schwab to transfer Hugh's'  
25 assets in his prior custodial account to Hugh's' new

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1 adult account at Schwab.

2 We argue that the act of the Debtor in  
3 Possession was legal and lawful, and that it cannot be  
4 used against him for any purposes for the following  
5 reasons:

6 The restriction order was one obtained by  
7 Schwab upon the Debtor in Possession's consent, hence  
8 it is true, that once agreed to, the Debtor in  
9 Possession did not violate it.

10 However, a transfer of assets upon the express  
11 consent of the parties to the agreement is a lawful  
12 modification of the order, and not a violation thereof.

13 Had plaintiff transferred said assets without  
14 Schwab's consent, plaintiff would have violated the  
15 order.

16 Here, Schwab had done it upon the Debtor in  
17 Possession's authorization, hence the Debtor in  
18 Possession cannot sue Schwab for any violation of the  
19 order, but nor can Schwab sue the Debtor in Possession  
20 for any violation thereof.

21 Actually, there was a valid modification of  
22 the order, but not a violation of that order.

23 Any party who may claim that there was a  
24 violation from which it suffered damages, must or may  
25 sue, but not Schwab or plaintiff, especially against

1 each other.

2 Further, concerning plaintiff's consent not to  
3 contact Schwab except through counsel, plaintiff argues  
4 that this is a trivial, which is to say not a material  
5 breach, in that it did not cause any damage; nothing  
6 legal has been done,.

7 In addition, the agreement of plaintiff,  
8 Dr. Mac Truong, did not bind the Debtor in Possession,  
9 Mac Truong, who pursuant to Bankruptcy Code is the  
10 trustee of his estate, and may sign an authorization  
11 form requested by Hugh and Schwab, if he so deemed it  
12 appropriate.

13 The Debtor in Possession did not have to get  
14 Schwab's attorneys' authorization to do so.

15 This issue of whether requests made by the  
16 Debtor in Possession to transfer assets was cause to  
17 sanction the Debtor in Possession was raised and  
18 dismissed.

19 In light of the foregoing, the second transfer  
20 in June of 2001 of Hugh's' assets in his adult account  
21 in Schwab to his adult account at D.T. Waterhouse was a  
22 violation of the order, it can only be so because of  
23 Schwab's failure to have obtained the Debtor in  
24 Possession's consent first.

25 Therefore, had the Debtor of Possession, Mac

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1 Truong, consented or authorized such transfer, it would  
2 have been a completely lawful modification of it, and  
3 not a violation thereof, since it had obtained the  
4 necessary consent of all the concerned and competent  
5 parties.

6 As a note, Levy as a would-be creditor or even  
7 a genuine creditor of the Debtor in Possession's  
8 estate, had no say or authority or no standing, I  
9 assume, to give his consent in this matter.

10 Also, since Levy's standing is not finally  
11 determined at this point, and by that I mean Truong and  
12 Truong's standing is not finally determined vis-a-vis  
13 Vietnam, it would be suggested that the matter should  
14 not be litigated piecemeal at this point, without first  
15 determining the issues of ownership between and as  
16 between those parties.

17 Finally, the Bankruptcy Code Section s 542(b)  
18 and 543(b), et cetera, gave to the Debtor in Possession  
19 the right to have the assets returned to him, or I  
20 should say to the Bankruptcy Court. Only Schwab and  
21 the Debtor in Possession's respective consents were  
22 needed to make any transfer of assets held by Schwab,  
23 make it legal or make it a lawful modification, and  
24 therefore not a violation by the competent parties to  
25 the order allowing Schwab to restrict the distribution

1 of the Debtor in Possession's assets.

2 It is therefore somewhat spurious that Schwab,  
3 who had made the transfer voluntarily, filed the  
4 complaint that the Debtor in Possession had violated  
5 the order by having ordered and authorized it.

6 There was no authorization by the Debtor in  
7 Possession for the transfer out of the assets, and even  
8 if there had been one, nothing illegal had been done by  
9 either Schwab or Hugh or the Debtor in Possession.

10 Indeed, Schwab had the power to transfer out  
11 the assets which had been restricted upon the Debtor in  
12 Possession's consent and upon his authorization.

13 Therefore, in this matter, only the Debtor in  
14 Possession can be heard to complain.

15 THE COURT: Okay.

16 MR. HERSHKOWITZ: Just to nail at one of the  
17 points, Schwab does not have completely clean hands in  
18 this matter. They participated and they likely did  
19 incur some technical violation of the Bankruptcy stays  
20 by doing so.

21 THE COURT: Counselor, the money in the  
22 custodial account is money that your client collected  
23 which is -- and there's certainly a dispute as to who  
24 that money belongs to, whether it belongs to him,  
25 whether it belongs to the Government of Vietnam, or

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1 whether it belongs to these one or more shipping lines  
2 or private companies.

3 MR. HERSHKOWITZ: Your Honor --

4 THE COURT: Let me finish. I let you finish.

5 MR. HERSHKOWITZ: Thank you. Yes, you did.

6 THE COURT: My order was to make sure that no  
7 moneys from any of those accounts were removed.

8 Your client violated that order. And unless  
9 the money goes back or the units go back, I'm going --  
10 I hold him in contempt -- and I'm going to confine him  
11 appropriately until he complies with the order. That's  
12 it.

13 I'm directing the attorney for Schwab to bear  
14 an appropriate arrest order and warrant, and that's  
15 what I plan to do.

16 And you have an exception to my ruling.

17 And he still has a little time because I  
18 haven't signed the order and the warrant, but once  
19 that's done, the dye is cast, and he's going to be  
20 incarcerated until that money is restored or those  
21 units are restored or both.

22 MR. HERSHKOWITZ: If you will indulge me one  
23 moment, I must make a technical argument.

24 THE COURT: Go ahead.

25 MR. HERSHKOWITZ: On the face of the order

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1 your Honor issued from the bench and so ordered  
2 subsequently on the last date your Honor directing  
3 Dr. Truong to buy back --

4 THE COURT: No, I didn't. We don't know if  
5 those units are still available.

6 I say all I want to do is restore the account  
7 to the position it was in before the withdrawal was  
8 made, the withdrawal which, in my view, clearly  
9 violated my order.

10 To the extent that there -- that his son may  
11 have disposed -- I don't know what his son has done  
12 with this. As I understand it, the money went from the  
13 custodial account to another Schwab account, and then  
14 went out of Schwab completely.

15 We don't know whether or not those units are  
16 in some other account, whether or not they have been  
17 sold, but they are units that are available and the way  
18 that your client can comply with my order is just to  
19 make sure that the account is restored to its proper  
20 position, that's all.

21 MR. HERSHKOWITZ: That wasn't the point I was  
22 going to make. Please --

23 THE COURT: Yes.

24 MR. HERSHKOWITZ: And I grant you its  
25 hyper-technical, but for the record on my client's

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1       behalf, your Honor in his order on Page Three of that  
2       order directed, and I'm not debating the substance of  
3       the direction, but the object of it, which was that he  
4       pay into the custodial account of Tron Troc. There is  
5       no issue that any moneys were removed by my client from  
6       the account of Tron Troc.

7               THE COURT: Whatever, I don't remember what  
8       account it is. What happened here, as I recall, and  
9       correct me, this is directed to the attorney for  
10      Schwab. My recollection is that the money was in the  
11      custodial account initially, and that he arranged, he  
12      participated in its removal from that account. That's  
13      what we're talking about.

14             MR. FOLEY: The custodial account is in the  
15      name of Hugh Mac Truong. There is a slight error in  
16      the record.

17             THE COURT: Whatever. What the units were  
18      improperly removed from is the accounts, they should be  
19      returned, and that account remains frozen as far as I'm  
20      concerned.

21             Anything else?

22             MR. HERSHKOWITZ: On the same order, on Page  
23      Seven, and we read the order to say --

24             THE COURT: I'm going to sign a written Order  
25      in order to have him arrested and incarcerated. It's



1 got to be something on paper.

2 And I'm directing the attorney for Schwab to  
3 prepare the order. And I think there's a warrant or  
4 some sort of form that's necessary that they have to  
5 give to the Sheriff to pick him up and arrange to have  
6 him delivered, I think, to the Queens House of  
7 Detention, I'm not sure. In order to do that, you must  
8 have put him on proper notice of your intent to do  
9 that. I read your Honor's last order to say,  
10 "Counselor -- "this your Honor, "I'm going to give you  
11 ten days to do that. If he doesn't do it, I will give  
12 you another date," as though to indicate today is not  
13 the final date.

14 THE COURT: The date will be the date on which  
15 I sign the papers that the attorney for Schwab is going  
16 to submit. So you have -- I don't know how fast he's  
17 going to move on that. As soon as I get those papers,  
18 they're going to be signed, counselor.

19 Anything else? Anybody else want to put  
20 something on the record.

21 MR. FOLEY: Just one last little thing. They  
22 raise an issue of whether, with regard to a hearing --  
23 on the date this motion was submitted, your Honor asked  
24 Schwab and asked the plaintiff whether a hearing was  
25 necessary, whether anyone had given any testimony.

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1 I indicated that I believed that the  
2 documents, the affidavits and the documents were  
3 adequate for finding contempt. Dr. Truong agreed.

4 MR. HERSHKOWITZ: Well, I don't see that in  
5 the record. I don't dispute Mr. Foley's recollection.  
6 Dr. Truong wants a hearing.

7 MR. FOLEY: I think it was on November 5th.

8 THE COURT: I don't think a hearing is  
9 necessary.

10 MR. HERSHKOWITZ: He's in the process of  
11 trying to muster assets. Can you give him a little  
12 time to do that?

13 THE COURT: How long will it take you to  
14 prepare the necessary papers, counselor?

15 MR. HERSHKOWITZ: He's too fast.

16 MR. FOLEY: I'm not fast enough for your  
17 client.

18 MR. HERSHKOWITZ: Give us a little time. Give  
19 us a week.

20 THE COURT: I'll tell him to settle an order.

21 MR. HERSHKOWITZ: Give us 15 days.

22 THE COURT: Tell me -- I'm talking to the  
23 lawyer for Schwab --

24 MR. HERSHKOWITZ: Judge, we're asking for an  
25 extension.

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1 THE COURT: Just a second, counselor.

2 MR. FOLEY: -- Friday.

3 THE COURT: Okay. You have until the end of  
4 the week. Now I have --

5 MR. HERSHKOWITZ: Judge --

6 THE COURT: Just a second. I've got a motion  
7 by the attorney for the intervener for default  
8 judgement. But it seems to me that that's certainly  
9 stayed by virtue of the removal to the Southern  
10 District.

11 MR. FOLEY: I believe you ruled on that the  
12 last time.

13 THE COURT: We will adjourn that motion for 30  
14 days just to see what happens. That will take us to --  
15 let's see what date that is -- all right May 29th .

16 MR. HERSHKOWITZ: Could you get us into - -  
17 May 29th?

18 THE COURT: That's on the motion, that's not  
19 --

20 MR. HERSHKOWITZ: That's for submission.

21 THE COURT: I'm adjourning the motion that I  
22 think is stayed to May 29th, and you have an Order to  
23 Show Cause here.

24 MR. HERSHKOWITZ: Well, that was asking your  
25 Honor to hold a hearing on the matters on which your

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1 Honor just heard.

2 THE COURT: So that I'm marking the making of  
3 the motion immediately returnable and denying it.

4 Okay.

5 MR. HERSHKOWITZ: Just to convert assets to  
6 the units which Schwab requires is going to take my  
7 client more than three days. It's not possible, your  
8 Honor.

9 THE COURT: He's had ten days, counselor.

10 MR. HERSHKOWITZ: Judge, we would ask for  
11 whatever time you could extend as possible.

12 THE COURT: Just a minute.

13 MR. HERSHKOWITZ: How about an interim date by  
14 which he can show progress toward satisfying --

15 THE COURT: No, no. Hold on for a minute.

16 MR. HERSHKOWITZ: -- just to transfer the  
17 money and to buy the units.

18 THE COURT: What?

19 MR. HERSHKOWITZ: He's asking for time to  
20 transfer the money and to buy the units.

21 THE COURT: Counselor, I gave him ten days the  
22 last time we were together.

23 MR. HERSHKOWITZ: He's asking for time again.

24 THE COURT: Make it next Monday. All right.

25 Bring the papers in next Monday, a week.

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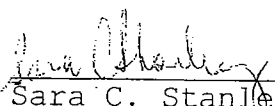
1 It will take probably seven or eight or nine  
2 days for me to get those approved and signed. Okay.  
3 But I'm adjourning the motion.

4 The whole case is on for the 29th. If it's  
5 still in the Federal Court, we will mark it stayed.  
6 it's system)

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9  
10 CERTIFICATION

11 Certified to be a true and accurate transcript.  
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15   
16 Sara C. Stanley  
17 Senior Court Reporter  
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